

Ong Yew Teik v Ng Wai Pin and other appeals

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
 NOS W-02(IM)(NCvC)-1194-06 OF 2022, W-02(IM)(NCvC)-1195-06
 OF 2022, W-02(IM)(NCVC)-1196-06 OF 2022 AND
 W-02(IM)(NCVC)-1197-06 OF 2022
 KAMALUDIN MD SAID, HASHIM HAMZAH AND COLLIN
 SEQUERAH JJCA
 25 NOVEMBER 2024

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Civil Procedure — Striking out — Appeal against order allowing striking out — Plaintiff filed action for fraud, tort of conspiracy to injure, tort of abuse of court process and malicious prosecution against defendants in relation to defendants' conduct in previous suit — Defendants filed applications to strike out plaintiff's action — High Court allowed striking out applications — Whether principle of res judicata and/or estoppel in its wider sense applicable to plaintiff's present action — Whether plaintiff's claim for malicious prosecution suited for summary mode of disposal — Whether High Court erred in finding that claim for malicious prosecution only confined to cases of winding up and bankruptcy proceedings — Whether there was basis for inquiry as to whether exceptions to witness immunity principle as recognised by courts in United Kingdom ought to be similarly extended in our jurisdiction — Whether plaintiff's case was obviously unsustainable which would warrant striking out — Rules of Court 2012 O 18 r 19(1)(a)

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In Suit 1333, the plaintiff (the appellant in the present appeals) brought an action against the first defendant to recover debt pursuant to an acknowledgment of debt signed by the first defendant. The High Court dismissed the plaintiff's action but on appeal ('Appeal 1694'), the Court of Appeal found in favour of the plaintiff. In the aftermath of the proceedings in Suit 1333, the plaintiff discovered that there were multiple wrongful and unlawful actions and conducts committed by the first defendant to hinder and complicate the progress of Suit 1333 and that such actions of the first defendant were abetted and aided by the other defendants. This discovery led to the filing of another suit by the plaintiff against the second defendant and the other defendants for fraud, tort of conspiracy to injure by unlawful means, tort of abuse of court process and additionally, malicious prosecution against the first defendant. The defendants filed striking out applications against the plaintiff's suit pursuant to O 18 r 19(1)(a) of the Rules of Court 2012. In allowing the striking out applications, the learned judicial commissioner found that: (a) the plaintiff's claim was res judicata; (b) the tort of malicious prosecution was limited to claims that arose in proceedings that questioned the financial credit of a litigant such as that arising in bankruptcy and winding up

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- A claims; (c) based on the current legal position under Malaysian law, the defendants were entitled to rely on the defence of witness immunity and the exceptions to the general rule of immunity did not apply to the pleaded case against the defendants; and (d) it would be an abuse of process for the court to allow the plaintiff to attempt to claim new damages against the defendants
- B based on the same failure to pay the sum of RM8,018,225 that was earlier pursued in Suit 1333. Aggrieved by the decision, the plaintiff filed the present appeals.
- C **Held**, setting aside the order of the judicial commissioner, allowing the appeals, and remitting all the cases back to the High Court for full trial with costs of RM60,000 for each appeal subject to allocatur:
- D (1) The principles governing the striking out of pleadings under O 18 r 19 (1) of the Rules of Court 2012 were well settled and a court would only allow for striking out in plain and obvious cases (see para 58).
- E (2) Upon a consideration of the submissions by both parties, the court found that: (a) Suit 1333 was only against the first defendant and it was premised on the breach of the acknowledgment of debt; (b) the issues of fraud, conspiracy by way of unlawful means and/or tort of abuse of process and/or malicious prosecution were never mentioned and/or submitted and/or decided in Suit 1333 and/or the Appeal 1694; (c) the second, third, fourth and fifth defendants were fresh parties to the present lawsuit and the plaintiff had never sought damages against them in Suit
- F 1333; (d) the issues in the present suit could not be raised during Suit 1333 and was also not a subject and/or issue in Suit 1333; and (e) the damages claimed in Suit 1333 by the plaintiff had no correlation with the present claim. Therefore, the principle of *res judicata* and/or estoppel in its wider sense did not apply to the plaintiff's present claim (see
- G paras 61–68).
- H (3) In relation to tort of malicious prosecution, the plaintiff had set out, in the statement of claim, the facts and circumstances where the second defendant and the first defendant together with the other defendants had committed the fraudulent and unlawful acts against the plaintiff. From a perusal of the pleadings as a whole, it merited at the very least an examination of whether the first defendant's counterclaim and defence in Suit 1333, amounted to a malicious prosecution. Given the numerous allegations and multiple facts alleged, the cause of action brought by the
- I plaintiff was hardly suited for a summary mode of disposal. It would necessarily involve a minute examination and consideration of the affidavits and documentation as well as the testimony of witnesses in order to come to a determination or finding of the strength of the plaintiff's claim (see paras 73–74 & 77–79).

- (4) The High Court had erred in finding that a claim for malicious prosecution was only confined to cases of winding up and bankruptcy proceedings. In this regard, the High Court had failed to consider that abuse of court process and that of malicious prosecution was actionable under the law of tort (see paras 81 & 83). A
- (5) The learned judicial commissioner had erred when he failed to realise that the courts in the United Kingdom had recognised and accepted that there were exceptions to the witness immunity principle and that such protection should not be a blanket protection in all circumstances without due consideration and appreciation of the facts of the claim. There was thus at least some basis for an examination or inquiry as to whether the exceptions to the witness immunity principle ought to be similarly extended in our jurisdiction (see paras 89 & 91). B C
- (6) The court found that based upon an examination of the amended pleading and the causes of action alleged, namely tort of conspiracy to injure by unlawful means, fraud with particulars pleaded, tort of abuse of the process of court and malicious prosecution, all of which were also particularised, this was not a case which was so obviously unsustainable which would warrant a striking out. The court found that the learned judicial commissioner had therefore erred in striking out the plaintiff's claims against the defendants (see paras 92–93). D E

[Bahasa Malaysia summary]

Dalam Saman 1333, plaintif (perayu dalam rayuan-rayuan semasa) memfailkan tindakan terhadap defendan pertama untuk mendapatkan kembali hutang menurut pengakuan hutang yang ditandatangani oleh defendan pertama. Mahkamah Tinggi menolak tuntutan plaintif tetapi atas rayuan ('Rayuan 1694'), Mahkamah Rayuan memihak kepada plaintif. Selepas prosiding dalam Saman 1333, plaintif mendapati terdapat pelbagai tindakan dan kelakuan yang salah dan menyalahi undang-undang yang dilakukan oleh defendan pertama untuk menghalang dan merumitkan proses Saman 1333 dan bahawa tindakan defendan pertama tersebut dilakukan dengan persubahatan dan bantuan defendan-defendan yang lain. Penemuan ini membawa kepada pemfailan satu lagi saman oleh plaintif terhadap defendan kedua dan defendan-defendan lain berdasarkan fraud, tort konspirasi untuk mencederakan dengan cara yang menyalahi undang-undang, tort penyalahgunaan proses mahkamah dan juga, pendakwaan berniat jahat terhadap defendan pertama. Defendan-defendan memfailkan permohonan pembatalan saman plaintif menurut A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah 2012. Dalam membenarkan permohonan pembatalan tersebut, pesuruhjaya kehakiman yang bijaksana mendapati bahawa: (a) tuntutan plaintif adalah *res judicata*; (b) tort pendakwaan berniat jahat adalah terhadap kepada tuntutan yang timbul dalam prosiding yang mempersoalkan kredit kewangan pihak dalam litigasi seperti yang timbul dalam tuntutan F G H I

- A kebankrapan dan penggulangan; (c) berdasarkan kedudukan undang-undang semasa di bawah undang-undang Malaysia, defendan-defendan berhak bergantung pada pembelaan kekebalan saksi dan pengecualian kepada peraturan umum kekebalan tidak terpakai bagi kes yang diplid terhadap defendan-defendan; dan (d) ia merupakan satu penyalahgunaan proses jika
- B mahkamah membenarkan percubaan plaintif untuk menuntut ganti rugi baharu terhadap defendan-defendan berdasarkan kegagalan yang sama untuk membayar jumlah RM8,018,225 yang sebelum ini dituntut dalam Saman 1333. Terkilan dengan keputusan tersebut, plaintif memfailkan rayuan-rayuan semasa.
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Diputuskan, mengenyepikan perintah pesuruhjaya kehakiman, membenarkan rayuan-rayuan, dan mengembalikan semula semua kes ke Mahkamah Tinggi untuk perbicaraan penuh dengan kos RM60,000 bagi setiap rayuan tertakluk kepada alokatur:

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- (1) Prinsip-prinsip yang mengawal pembatalan pliding di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah 2012 adalah mantap dan mahkamah hanya membenarkan pembatalan dalam kes-kes yang jelas dan nyata (lihat perenggan 58).
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- (2) Setelah mempertimbangkan penghujahan oleh kedua-dua pihak, mahkamah mendapati bahawa: (a) Saman 1333 hanya terhadap defendan pertama dan ia adalah berdasarkan kemungkiran pengakuan hutang; (b) isu-isu fraud, konspirasi dengan cara yang menyalahi undang-undang dan/atau tort penyalahgunaan proses dan/atau pendakwaan berniat jahat tidak pernah disebut dan/atau dihujahkan dan/atau diputuskan dalam Saman 1333 dan/atau Rayuan 1694; (c) defendan kedua, ketiga, keempat dan kelima adalah pihak baharu dalam tuntutan mahkamah semasa dan plaintif tidak pernah menuntut ganti rugi terhadap mereka dalam Saman 1333; (d) isu-isu dalam saman semasa tidak boleh dibangkitkan semasa Saman 1333 dan juga bukan subjek dan/atau isu-isu dalam Saman 1333; dan (e) ganti rugi yang dituntut dalam Saman 1333 oleh plaintif tidak mempunyai kaitan dengan tuntutan semasa. Oleh itu, prinsip res judicata dan/atau estoppel dalam erti kata yang lebih luas tidak terpakai ke atas tuntutan semasa pihak plaintif (lihat perenggan 61–68).
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- (3) Berhubung dengan tort pendakwaan berniat jahat, plaintif telah menyatakan, dalam pernyataan tuntutanannya, fakta dan keadaan di mana defendan kedua dan defendan pertama bersama-sama defendan-defendan lain telah melakukan perbuatan fraud dan menyalahi undang-undang terhadap plaintif. Daripada penelitian pliding secara keseluruhan, sekurang-kurangnya pemeriksaan diperlukan bagi persoalan sama ada tuntutan balas dan pembelaan defendan pertama dalam Saman 1333, berjumlah kepada pendakwaan berniat jahat.
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Memandangkan banyak dakwaan dan pelbagai fakta yang didakwa, kausa tindakan yang dibawa oleh plaintif tidak sesuai untuk kaedah pelupusan secara terus. Ia semestinya melibatkan pemeriksaan minit dan pertimbangan afidavit dan dokumentasi serta keterangan saksi untuk mencapai penentuan atau dapatan berkenaan kekuatan tuntutan plaintif (lihat perenggan 73–74 & 77–79).

- (4) Mahkamah Tinggi telah terkhilaf apabila mendapati tuntutan untuk pendakwaan berniat jahat hanya terhad kepada kes penggulangan dan prosiding kebangkrapan. Dalam hal ini, Mahkamah Tinggi telah gagal mempertimbangkan bahawa penyalahgunaan proses mahkamah dan pendakwaan berniat jahat boleh diambil tindakan di bawah undang-undang tort (lihat perenggan 81 & 83).
- (5) Pesuruhjaya kehakiman yang bijaksana telah terkhilaf apabila beliau gagal menyedari bahawa mahkamah-mahkamah di United Kingdom telah mengiktiraf dan menerima bahawa terdapat pengecualian kepada prinsip kekebalan saksi dan bahawa perlindungan tersebut tidak seharusnya menjadi perlindungan menyeluruh dalam semua keadaan tanpa pertimbangan dan penghayatan yang sewajarnya terhadap fakta tuntutan. Oleh itu, terdapat sekurang-kurangnya beberapa asas untuk pemeriksaan atau siasatan sama ada pengecualian kepada prinsip kekebalan saksi patut diperluaskan dengan cara yang sama dalam bidang kuasa mahkamah di sini (lihat perenggan 89 & 91).
- (6) Mahkamah mendapati bahawa berdasarkan pemeriksaan pliding yang dipinda dan kausa tindakan yang didakwa, iaitu tort konspirasi untuk mencederakan dengan cara yang menyalahi undang-undang, fraud dengan butiran yang telah diplid, tort penyalahgunaan proses mahkamah dan pendakwaan berniat jahat, yang kesemuanya turut diperincikan, ini bukanlah satu kes yang jelas sekali tidak mampan yang akan menjamin pembatalan. Mahkamah mendapati bahawa pesuruhjaya kehakiman yang bijaksana telah terkhilaf dalam menolak tuntutan plaintif terhadap defendan-defendan (lihat perenggan 92–93).]

Cases referred to

- Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)
- Darker (as personal representative of Docker, deceased) v Chief Constable of the West Midlands Police* [2000] 3 WLR 747, HL (refd)
- Goldsmith v Sperrings Ltd and others* [1977] 1 WLR 478, CA (refd)
- Saripah bte Manap & Ors v Emar Sdn Bhd (in dissolution) & Ors* [1998] 1 MLJ 32, HC (refd)
- Yong Toi Mee & Anor v Malpac Holdings Bhd & Ors* [2017] MLJU 1674, HC (refd)

A Legislation referred to

Rules of Court 2012 O 18 r 19(1), (1)(a), (1)(d)

Appeal from: *Ong Yew Teik v Kamal YP Tan & Ors* [2022] MLJU 1342 (High Court, Kuala Lumpur)

B

Roshan Selvaratnam (Roshan Advocates & Solicitors) in Civil Appeal Nos W-02(IM)(NCvC)-1194-06 of 2022, W-02(IM)(NCvC)-1195-06 of 2022, W-02(IM)(NCVC)-1196-06 of 2022 and W-02(IM)(NCVC)-1197-06 of 2022 for the appellant.

C

Ng Wai Pin (Elizabeth Lau Advocates & Solicitors) in Civil Appeal No W-02(IM)(NCvC)-1194-06 of 2022 for the respondents.

Wong Yoke Yen (Kit & Assoc) in Civil Appeal No W-02(IM)(NCvC)-1195-06 of 2022 for the respondents.

D

Michael Gunalan Benedict (with Wong Fook Lin) (Surendra Ananth Advocates & Solicitors) in Civil Appeal No W-02(IM)(NCvC)-1196-06 of 2022 for the respondents.

Kamal YP Tan (Robert Low & Ooi) in Civil Appeal No W-02(IM)(NCVC)-1197-06 of 2022 for the respondents.

E**Collin Sequerah JCA:**

INTRODUCTION

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[1] All these appeals were heard together. After hearing parties and considering the submissions, we unanimously allowed all the appeals.

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[2] The learned Chairman of the panel YA Dato' Seri Kamaluddin has since retired. My learned brother, YA Dato' Hashim Hamzah has approved the draft of this judgement.

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[3] All these appeals arise out of the orders of the Kuala Lumpur High Court dated 14 June 2022, wherein the High Court allowed the second defendant's (respondent) application dated 1 September 2021 pursuant to O 18 r 19(1)(a) of the Rules of Court 2012 to strike out the appellant's/plaintiffs suit ('striking out application').

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[4] The first, third, fourth and fifth defendants (respondents) of the suit had filed similar striking out applications against the appellant's/plaintiff's suit and the learned High Court judicial commissioner ('JC') having heard all four striking out applications together, had allowed all four striking out applications on 14 June 2022.

[5] The resulting appeals by the appellant/plaintiff arising out of these

striking out applications are as follows:

- (a) W-02(IM)(NCvC)-1194-06 of 2022 (second defendant's striking out application) ('1194 Appeal');
- (b) W-02(IM)(NCvC)-1195-06 of 2022 (fourth defendant's striking out application) ('1195 Appeal');
- (c) W-02(IM)(NCvC)-1196-06 of 2022 (third and fifth defendant's striking out application) ('1996 Appeal'); and
- (d) W-02(IM)(NCvC)-1197-06 of 2022 (first defendant's striking out application) ('1197 Appeal').

[6] For ease of reference and to avoid confusion, the parties, save for the appellant/plaintiff, will be referred to in their respective capacities as they were in the High Court.

BACKGROUND FACTS

[7] The appellant/plaintiff commenced an action against the first defendant in the High Court of Kuala Lumpur vide Civil Suit No S5-22-1333 of 2007 ('Suit 1333') to recover the debt pursuant to an acknowledgment of debt signed by the first defendant.

[8] The first defendant filed his defence and counterclaim dated 13 February 2008. in the first defendant's defence and counterclaim to Suit 1333, he averred, inter alia, the following:

- (a) disputed the debt by denying that he had signed the said acknowledgment of debt;
- (b) that if contrary to the first defendant's contention it be held that he did sign the acknowledgment of debt, the acknowledgment of debt was null and void upon a failure of consideration as there was no debt and still no debt due from the first defendant to the appellant/plaintiff;
- (c) that if contrary to the first defendant's contention it be held that he did sign the acknowledgment of debt, he was induced by the appellant/plaintiff's representations into signing an undated acknowledgment of debt sometime in August 2006 and that he had delivered it to the appellant/plaintiff in escrow upon terms that it was subject to conditions precedent (which were not fulfilled);
- (d) that the appellant/plaintiff was not the absolute beneficial owner of the 271,600 shares of Euroceramic Technologies Companies Ltd (ECT). The said shares at all material times legally and beneficially belonged to the appellant's/plaintiffs uncle namely Yue Sau Yin ('Roger Yue');

- A** (e) that the first defendant only discovered for the first time that the appellant/plaintiff was not the absolute beneficial owner of the said shares when a copy of a letter dated 4 September 2006 from Roger Yue was shown to him;
- B** (f) that the appellant/plaintiff was not able to transfer and register the said shares in the first defendant's name free from all claims and encumbrances;
- (g) that the shares were only valued at RM4.3m;
- C** (h) that the first defendant had signed on an undated acknowledgment of debt, of which had subsequently been unilaterally altered by the appellant/plaintiff by inserting the words '06 NOV 2006' and therefore, the acknowledgment of debt had become null and void; and
- D** (i) instead, the appellant/plaintiff owed him a sum of RM3,584,211.42 for alleged personal loans.

[9] After a full trial, the High Court dismissed the appellant's/plaintiff's claim against the first defendant and allowed the first defendant's counterclaim with costs of RM70,000.

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- [10] Upon appeal, the Court of Appeal by a majority, allowed the appellant's/plaintiffs appeal and entered judgment against the first defendant in favour of the appellant/plaintiff's claim and set aside the High Court judgment ('1694 Appeal')
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[11] The Court of Appeal in doing so made, inter alia, the following findings:

- G** (a) there is abundant evidence to show that the first defendant's claim that he signed the acknowledgment of debt in escrow in August 2006 is inherently improbable;
- (b) the emails exchanged between the second defendant and Yeap Hong Imm (the plaintiff's lawyer) were genuine;
- H** (c) the evidence at trial proved convincingly that the first defendant did sign the acknowledgment of debt on 6 November 2006;
- (d) the evidence led by the appellant/plaintiff firmly sustained his claim that the acknowledgment of debt was indeed signed on 6 November 2006;
- I** (e) the letter of pre-agreement dated 26 October 2006 explained how the acknowledgment of debt dated 6 November 2006, the Acknowledgement of payment for Lot 6 Tropicana dated 6 November 2006 and the acknowledgment of payment of personal loans dated 6 November 2006 came to be drawn up and signed;

- (f) the appellant's/plaintiff's witnesses which included Choa Swee Lin ('Choa') (PW2), Warayut Amornpongchai ('Warayut') (PW3), Edward Mosses a/l Julius Josephath ('Edward') (PW4) and Kong Ah Choo ('Kong') (PW5) were not ordinary employees of ECT, but were either shareholders, directors or persons within ECT who had real and relevant information on the share dealing, and that their testimonies were consistent between themselves and with the appellant's/plaintiffs case; A
B
- (g) Roger Yue was the appellant's/plaintiff's nominee shareholder in ECT, and Roger Yue was also the nominee of several other shareholders; C
- (h) the tripartite agreement amongst the appellant/plaintiff, Roger Yue and the first defendant existed, that resulted in the appellant/plaintiff first transferring his ECT shares to Roger Yue on 31 October 2006, and that on the following day ie 1 November 2006, Roger Yue transferred those same shares to the first defendant pursuant to the sale and purchase agreement entered into between the first defendant and Roger Yue; D
- (i) following the transfer of the appellant/plaintiff's ECT shares by Roger Yue to the first defendant, on 1 November 2006, the first defendant informed the appellant's/plaintiffs then solicitors on the adjustments to be made to the amount mentioned in all three acknowledgments in line with the letter of pre-agreement; E
- (j) there were no pre-conditions for the execution and depositing of the acknowledgment of debt by the first defendant as alleged by him; F
- (k) with the timeline and the several matters that had to be organised and attended to before any transfer of the appellant's/plaintiffs ECT shares could be made, the appellant's/plaintiff's case that on 6 November 2006 the first defendant signed all three acknowledgments, which contained the adjusted sums, was clearly the version that was proved; and G
- (l) the first defendant had not proved his counterclaim against the appellant/plaintiff, even on balance of probabilities.
- [12] The first defendant thereafter appealed to the Federal Court wherein leave was dismissed and subsequently, the first defendant's application to review the Federal Court decision was also dismissed ('Federal Court proceedings'). H
- [13] In the aftermath of the proceedings in Suit 1333, the appellant/plaintiff discovered that there were multiple wrongful and unlawful actions and conducts committed by the defendants to defraud and hinder and complicate the progress of Suit 1333 and that such actions of the first defendant were abetted and aided by the other defendants. I

A [14] It was alleged that the second defendant together with the first defendant had conspired to support the fabricated and false facts alleged by the first defendant.

B [15] Among the wrongful and unlawful conduct by the fourth defendant and the first defendant together with the other defendants includes intimidation and coercion of witnesses, fabrication and/or forgery of documents, use of fabricated documents, preparing false affidavits, witness statements, submissions and reply submissions and conspiracy with witnesses to injure the appellant/plaintiff and the appellant/plaintiffs case.

C [16] In addition to the above, the sixth defendant together with the first defendant had also conspired with the third and fifth defendants to dupe, coerce and manipulate the following witnesses (who have since recanted and have filed police reports against the first defendant and the sixth defendant, amongst others) to abet and support the first defendant's false and fabricated facts:

(a) Kong Ah Choo ('Kong');

E (b) Edward Mosses Julius Josephath ('Edward') (deceased); and

(c) Law Swee Haw ('Law').

F [17] As such, the appellant/plaintiff had commenced an action against the second defendant and the other defendants for fraud, tort of conspiracy to injure by unlawful means, tort of abuse of court process and additionally, malicious prosecution against the first defendant.

G [18] The defendants filed striking out applications against the appellant/plaintiffs suit.

Findings of the High Court

H [19] The High Court in allowing the striking out applications held, inter alia, the following.

I [20] The facts that the appellant/plaintiff relies on namely, the alleged fraudulent evidence presented at trial, alleged perjury, alleged false affidavits and submissions filed by the first defendant with the alleged assistance of the other defendants, were all available during Suit 1333.

[21] There are no valid reasons presented by the appellant/plaintiff that prevented him or his counsel from filing a claim based on the tort of abuse of process against the first defendant in Suit 1333. This could have and should

have been undertaken in Suit 1333, at the very least as an answer to the counterclaim filed by the first defendant. A

[22] As such, the learned JC found that for the tort of abuse of process and the interrelated fraud alleged against the defendants, the claim is barred by the doctrine of *res judicata*. The appellant/plaintiff should have and could have instituted the claims against the defendants for the alleged tort of abuse of process in the same Suit 1333. B

[23] Although the second defendant and the third to sixth defendants were not parties to Suit 1333, this does not mean that the doctrine of *res judicata* does not apply to those who were not a party to the earlier suit. C

[24] There are circumstances where the doctrine is legitimately extended not only to parties who were party to the earlier suit but also may apply to those who are privy to the parties involved in the earlier suit. D

[25] The learned JC found that it is abusive for the appellant/plaintiff to now attempt to re-open the issues again in this new suit. The claim against the second defendant and the third to sixth defendants all concerns evidence that was presented in the earlier suit and the damages claimed are all relating to the failure of the first defendant to pay the principal sum of RM8m expeditiously. E

[26] The learned JC said that the alleged perjury and alleged fraudulent representation of evidence by the defendants were before the High Court and were eventually dealt with by the Court of Appeal. This can be seen in paras 35 to 62 and 65 to 73 of the grounds of the Court of Appeal dated 10 January 2019 delivered by Mary Lim JCA (as she then was). F

[27] It cannot, therefore, be said that these issues were not before the court in Suit 1333. To allow the appellant/plaintiff to reopen this issue would be contrary to the principle of *res judicata*. G

[28] The learned JC found that the appellant/plaintiff is barred from pursuing the claim based on the tort of abuse of process against the second defendant, first, third, fourth and fifth defendants. H

[29] The learned JC further found that the tort of malicious prosecution is limited to claims that arise in proceedings that question the financial credit of a litigant such as that arising in bankruptcy and winding up claims. I

- A [30] The learned JC found that the tort of malicious prosecution does not extend to the allegations raised by the appellant/plaintiff against the defendants and hence, the claim based on tort of malicious prosecution should be struck out.
- B [31] However, the learned JC found that the appellant/plaintiff had sufficiently pleaded the necessary elements for the tort of conspiracy against the second defendant and the other defendants. Therefore, the learned JC declined to exercise his discretion to strike out the claim for conspiracy on this ground.
- C [32] The learned JC found that the tort of fraud based on the perjury in the earlier suit as suggested by the appellant/plaintiff, does not exist under Malaysia laws, and therefore, exercised his powers to strike out the aforesaid claim against the defendants that is grounded on this alleged tort.
- D [33] The learned JC opined that based on the current legal position under Malaysian law, the defendants are entitled to rely on the defence of witness immunity.
- E [34] The learned JC opined that the exceptions to the general rule of immunity do not apply to the pleaded case against the defendants. The defendants do not owe any duties to the appellant/plaintiff and the statements or evidence presented in Suit 1333 and the statements were made during legal proceedings. The said immunity remains valid in favour of the defendants.
- F Hence, the claims against the defendants should be struck out.

- G [35] The learned JC found that it is an abuse of process of the court to allow the appellant/plaintiff to attempt to claim new damages against the defendants based on the same failure to pay the sum of RM8,018,225 that was earlier pursued in Suit 1333. The appellant/plaintiff should have and could have raised these damages in the earlier suit at least against the first defendant.

PARTIES SUBMISSIONS

- H *The appellant*

- I [36] In summary, the appellant submitted that during the course of proceedings of Suit 1333, the appellant/plaintiff discovered that there were multiple wrongful and unlawful actions and conducts committed by the defendants to defraud and hinder and complicate Suit 1333 and such actions of the second defendant were abetted and aided by the other defendants.

[37] The defendants together with the second defendant had conspired therefore to support the fabricated and false facts alleged by the first defendant.

[38] Among the wrongful and unlawful conduct by the second defendant and the other respondents/defendants includes intimidation and coercion of witnesses, fabrication and/or forgery of documents, use of fabricated documents, preparing false affidavits, witness statements, submissions and reply submissions and conspiracy with witnesses to injure the appellant/plaintiff and the appellant/plaintiffs case. A
B

[39] In addition to the above, the sixth defendant together with the first defendant had also conspired with the third and fifth defendants to dupe, coerce and manipulate the witnesses (who have since recanted and have filed police reports against the first defendant and the sixth defendant, amongst others) to abet and support the first defendant's false and fabricated facts. C

[40] As a result, the appellant/plaintiff had commenced an action against the defendants for fraud, tort of conspiracy to injure by unlawful means, tort of abuse of court process and additionally, malicious prosecution against the first defendant. D

[41] The appellant submitted that all these constitute serious causes of actions that warrant documentary and/or witness evidence to be determined before the court and cannot be summarily struck out. E

[42] The appellant also submitted that the learned JC had erred in finding that the claim is barred by res judicata because Suit 1333 was only against the first defendant and it was premised on the breach of the acknowledgment of debt. F

[43] The issues of fraud, conspiracy by way of unlawful means and/or tort of abuse of process and/or malicious prosecution were never mentioned and/or submitted and/or decided in Suit 1333 and/or the 1694 Appeal. G

[44] The second defendant, third, fourth and fifth defendants are new parties to this lawsuit and the appellant/plaintiff had never sought damages against them in Suit 1333. H

The respondents (defendants)

[45] All the defendants more or less adopted common stands during the course of submissions. I

[46] In summary, it was submitted that the appellant's/plaintiff's claim does not disclose any cause of action against the second defendant because it is trite law that a witness in judicial proceedings is accorded absolute immunity from

A civil suits in respect of evidence given during court proceedings and that immunity extends to evidence given on affidavit.

B [47] Therefore based on the current legal position under Malaysian law, the defendants are entitled to rely on the defence of witness immunity and the exceptions to the general rule of immunity do not apply to the pleaded case against the defendants.

C [48] It was further submitted that the respondents/defendants do not owe any duties to the appellant/plaintiff as the statements or evidence presented at the 1333 Suit were made during legal proceedings.

D [49] It was submitted therefore that this was a plain and obvious case for the claims against the second defendant to be struck out

E [50] The respondent's also submitted that the plaintiff's claim against the second defendant was nothing more than a civil action in respect of evidence that the second defendant had given during the 1333 Suit.

F [51] The pleadings averred by the appellant/plaintiff against the defendants is that they had conspired to make false statements and/or fabricated evidence in respect of the 1333 Suit.

G [52] it was pointed out that the alleged false defence and counterclaim in the 1333 Suit was filed by the first defendant way back in 13 February 2008 and any allegation of abuse could or should have been raised in the same proceedings, either under O 18 r 19(1)(d) or as an answer to the counterclaim in the 1333 Suit.

H [53] The allegedly false affidavits and evidence already existed at the time of the 1333 Suit and were before the court in the 1333 Suit and the alleged loss and damages arising from non-payment or delay in payment of the RM8,018,225 could or should have been raised in the 1333 Suit.

I [54] These claims were thus barred by the doctrine of res judicata and amounted to an abuse of process as they either have been, or could and should have been, raised and decided in the 1333 Suit.

[55] It was submitted that the learned JC correctly held that the tort of malicious prosecution is limited to malicious institution of criminal prosecutions and is not generally available in civil proceedings except in bankruptcy and winding up proceedings in Malaysia.

[56] It was further submitted that the learned JC correctly held that Malaysian common law as it stands does not recognise a general tort of fraud based on the alleged perjury in the 1333 Suit.

A

[57] The learned JC had therefore not erred in striking out the actions.

B

ANALYSIS AND FINDINGS

The law on striking out

[58] The principles governing the striking out of pleadings under O 18 r 19(1) of the Rules of Court 2012 are well settled and a court will only allow for striking out in plain and obvious cases. See *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7.

C

[59] In *Saripah bte Manap & Ors v Emar Sdn Bhd (in dissolution) & Ors* [1998] 1 MLJ 32:

D

In fact, all these issues above are intertwined with legal questions that merit some serious consideration on my part. A summary procedure under O 18 r 19(1)(a) and (b) should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. *If it can be shown that the pleadings do disclose some cause of action or have raised some questions fit to be decided, however slight the chances are of succeeding, that case should not be struck off.* (Emphasis added)

E

[60] Having the basic principles with regard to the law on striking out in the forefront of our minds, we proceeded to consider the issues raised during the appeal and came to the following findings.

F

Res judicata

[61] Upon a consideration of the submissions by both parties, we find that Suit 1333 was only against the first defendant and it was premised on the breach of the acknowledgment of debt.

G

[62] The issues of fraud, conspiracy by way of unlawful means and/or tort of abuse of process and/or malicious prosecution were never mentioned and/or submitted and/or decided in Suit 1333 and/or the 1694 Appeal.

H

[63] The second defendant, third, fourth and fifth defendants are fresh parties to this lawsuit and the appellant/plaintiff had never sought damages against them in Suit 1333.

I

[64] The appellant's/plaintiff's present claim had not occurred when Suit 1333 was filed and the alleged fraudulent evidence and/or fabricated

- A documents and/or the fraudulent actions of the defendants were not within the appellant's/plaintiff's knowledge at the stage prior to the close of pleadings. These issues could not be raised during Suit 1333 and was also not a subject and/or issue in Suit 1333.
- B [65] The appellant's/plaintiff's present claim is not based on the facts of Suit 1333 namely the acknowledgment of debt and/or the ownership of the ECT shares but on the fraudulent and deliberate actions or conduct of the second defendant and the other defendants to conspire unlawfully to procure, fabricate and create false evidence to injure the appellant/plaintiff.
- C
- D [66] The appellant's/plaintiff's present case is not to determine the truth of the witnesses' statements in Suit 1333 but rather whether the witnesses had conspired unlawfully to give false evidence or fabricate evidence in order to injure the appellant/plaintiff during Suit 1333 and whether the conduct or acts of the second defendant together with the other defendants in Suit 1333 were unlawful.
- E [67] The damages claimed in Suit 1333 by the appellant/plaintiff has no correlation with the present claim as the claim in Suit 1333 was in relation to a breach of the acknowledgment of debt, while the damages prayed for in paras 72–74 of the statement of claim are damages suffered by the appellant/plaintiff due to the fraudulent and unlawful actions of the second defendant and the other defendants.
- F [68] We therefore find that the principle of *res judicata* and/or estoppel in its wider sense does not apply to the appellant's/plaintiff's present claim.
- Tort of malicious prosecution*
- G [69] The gist of the complaint or grievance of the appellant in the current suit is that the second defendant had abused the court process by producing and creating false evidence and committing the act of witness intimidation in order to mislead the court and to injure the appellant/plaintiff.
- H [70] It was further alleged that the first defendant had also initiated a false counterclaim against the appellant/plaintiff in order to injure the appellant/plaintiff and the first defendant was successful in misleading the High Court into allowing the first defendant's false counterclaim.
- I [71] In particular, it was averred that in the course of the proceedings in Suit 1333, the first defendant had conspired with the second defendant and the other defendants to support the false claims and/or fabrication of facts alleged by the first defendant in the affidavits and/or testimonies of the second

defendant and the other defendants and/or by producing and/or using fabricated documents in order to cause injury to the appellant/plaintiff ie to defraud the appellant/plaintiff, and hinder and/or delay the proceedings of Suit 1333. A

[72] It was submitted that instances of the creation and production of fake and/or false documents were as follows: B

- (a) the 'new' or newly created share registry of ECT;
- (b) the alleged Montri Report by one Montri Benjadani; and C
- (c) the letters of irrevocable instructions.

[73] The substratum of the appellant's claim in the High Court therefore was that the false affidavits, fabrication of facts and use of and fabrication of documents was the plan and/or strategy for the conspiracy throughout Suit 1333. D

[74] When one peruses the statement of claim as a whole, the appellant/plaintiff had set out the facts and circumstances where the second defendant and the first defendant together with the other defendants had committed such fraudulent and unlawful acts against the appellant/plaintiff. E

[75] In the statement of claim, it is further pleaded that the second defendant and the first defendant together with the other defendants had given fraudulent and false facts and/or fabricated documents both in their affidavits and/or testimonies in order to assist the first defendant's intention to defraud and injure the appellant/plaintiff ie to prevent the appellant/plaintiff from enforcing his rights under the acknowledgment of debt and to avoid paying a due debt and making a false counterclaim against the appellant/plaintiff. F G

[76] It is also alleged and averred that the first defendant had intentionally and knowingly, colluded and conspired with the second defendant and the other defendants to injure the appellant/plaintiff throughout the course of Suit 1333 including conspiring to make a fraudulent counterclaim. H

[77] From a perusal of the pleadings as a whole, it merits at the very least an examination of whether the first defendant's counterclaim and defence in Suit 1333, amounts to a malicious prosecution. I

[78] Given the numerous allegations and multiple facts alleged, the cause of action brought by the appellant is hardly suited for a summary mode of disposal.

- A [79] It would necessarily involve a minute examination and consideration of the affidavits and documentation as well as the testimony of witnesses in order to come to a determination or finding of the strength of the appellant's claim.
- B [80] The High Court further held that a claim for malicious prosecution is only confined to cases of winding up and bankruptcy proceedings.
- [81] The High Court had with the greatest of respect failed to consider that abuse of court process and that of malicious prosecution is actionable under the law of tort.
- C [82] See *Yong Toi Mee & Anor v Malpac Holdings Bhd & Ors* [2017] MLJU 1674 which quoted the dissenting judgement of Lord Denning MR in *Goldsmith v Sperrings Ltd and others* [1977] 1 WLR 478 as follows:
- D It is an actionable tort, according to Lord Denning MR, if *the legal process is abused in order to instead oppress or extort, or exert pressure to achieve an improper end*. This formulation has since been adopted in Malaysia, in the leading authority on the law governing the tort of abuse of process in the Court of Appeal decision in *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425 which in the judgment delivered by Gopal Sri Ram JCA (as he
- E then was) held that *the essence of the law is that it is an abuse of process where the process of the court is invoked not for the genuine purpose of obtaining relief claimed, but for a collateral purpose, such as to oppress a defendant*. (Emphasis added)
- F [83] We find therefore that the High Court had erred in finding that a claim for malicious prosecution is only confined to cases of winding up and bankruptcy proceedings.
- G [84] Despite the fact the learned judge had recognised that the appellant/plaintiff had sufficiently pleaded the necessary elements for tort of conspiracy he declined to exercise his discretion to strike out the claim for conspiracy.
- H [85] With the greatest of respect, we find that the learned judge had erred in this respect also.
- The witness immunity rule*
- I [86] In the course of overturning the decision of the High Court and allowing the appellant/plaintiff's claim in Suit 1333, the Court of Appeal made several telling remarks and/or findings in relation to the conduct of the first defendant, inter alia, that he had contradicted himself several times, that his claim was inherently improbable, that his contentions were 'untenable and untrue' and that he was 'extremely economical with the truth'.

[87] The appellant also averred that the conduct or acts of the second defendant and that of the other defendants and the witnesses were such that they have collaborated and conspired with each other and acted to fabricate or create false evidence to support a fabricated fact alleged by the first defendant in Suit 1333.

A

[88] The High Court held that the witness immunity principle extends only to the contents of the evidence provided by the witness but does not extend to the act of the witness collecting material on which he may later be called to give evidence and particularly does not extend to where the witness deliberately creates or procure false evidence for their interest of providing false evidence in court.

B

C

[89] The learned JC in that respect had erred when he failed to realise that the courts in the United Kingdom have recognised and accepted that there are exceptions to the witness immunity principle and that such protection should not be a blanket protection in all circumstances without due consideration and appreciation of the facts of the claim.

D

[90] See *Darker (as personal representative of Docker, deceased) v Chief Constable of the West Midlands Police* [2000] 3 WLR 747.

E

[91] There is thus at least some basis for an examination or inquiry as to whether the exceptions to the witness immunity principle ought to be similarly extended in our jurisdiction.

F

DECISION

[92] We find that based upon an examination of the amended pleading and the causes of action alleged, namely tort of conspiracy to injure by unlawful means, fraud with particulars pleaded, tort of abuse of the process of court and malicious prosecution, all of which were also particularised, this is not a case which is so obviously unsustainable which would warrant a striking out.

G

[93] We find that the learned JC had therefore erred in striking out the appellant/plaintiffs claims against the defendants.

H

[94] We therefore set aside the order of the learned JC. All these appeals are therefore allowed.

I

[95] We remit all the cases back to the High Court for full trial with costs of RM60,000 for each appeal subject to allocatur.

Judicial commissioner's order set aside; appeals allowed; all cases remitted back to

A *High Court for full trial with costs of RM60,000 for each appeal subject to allocatur.*

Reported by Dzulqarnain Ab Fatar

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